

INEFFECTIVE ASSISTANCE OF COUNSEL

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WE ALL MAKE MISTAKES

What is the Secret of SUCCESS?

"RIGHT DECISIONS",

How do you make Right Decisions?

"EXPERIENCE",

How do you get Experience?

"WRONG DECISIONS!"!

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INEFFECTIVE ASSISTANCE OF COUNSEL

- **Strickland v. Washington, 466 U.S. 668 (1984), test requires Applicant to show:**
 - 1. Counsel's performance was deficient. Requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment.**
 - 2. The deficient performance prejudiced the defendant.**

DEFICIENT PERFORMANCE

An appellate court “must indulge a strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance; that is, the [appellant] must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy.”

***Strickland*, 466 U.S. at 689**

DEFICIENT PERFORMANCE

“In the absence of evidence of counsel’s reasons for challenged conduct, an appellate court ‘commonly will assume a strategic motivation if any can possibly be imagined and will not conclude the challenged conduct constituted deficient performance unless the conduct was so outrageous that no competent attorney would have engaged in it.’”

***Garcia v. State*, 57 S.W.3d 436
(Tex. Crim. App. 2001)**

TRIAL COUNSEL'S REASONS

- Record must show why counsel took the actions that constitute ineffective assistance. *Thompson v. State*, 9 S.W.3d 808 (Tex. Crim. App. 1999); *Johnson v. State*, 2021 WL 2448365 (Tex. Crim. App., June 16, 2021)
- Trial counsel must provide affidavit or testimony.

TRIAL COUNSEL'S REASONS

“Under our system of justice, the criminal defendant is entitled to an opportunity to explain himself and present evidence on his behalf. His counsel should ordinarily be accorded an opportunity to explain her actions before being condemned as unprofessional and incompetent.”

***Bone v. State*, 77 S.W.3d 828, 836
(Tex. Crim. App. 2002)**

PREJUDICE

Purpose of *Strickland* test is to judge whether counsel's conduct so compromised the proper functioning of the adversarial process that the trial cannot be said to have produced a reliable result.

***Thompson v. State*, 9 S.W.3d 808
(Tex. Crim. App. 1999)**

TOTALITY OF REPRESENTATION

Appellate court looks to the totality of the representation and the particular circumstances of each case in evaluating the effectiveness of counsel.

Thompson, 9 S.W.3d at 813

It is possible that a single egregious error of omission or commission by counsel constitutes ineffective assistance.

Thompson, 9 S.W.3d 813

WHEN TO RAISE ISSUE

- **Ineffective Assistance of Counsel may (should) be raised for first time on a writ. *Ex Parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997).**
- **Trial record is rarely sufficient to show ineffective assistance.**

PARTIES INVOLVED IN INEFFECTIVE ASSISTANCE DETERMINATION

- **Writ Attorney**
- **Defense Attorney**
- **Prosecutor**
- **Trial Court Judge**
- **Court of Criminal Appeals**

Each Party Has Professional and Ethical Obligations

OBLIGATIONS OF WRIT ATTORNEY

- **Investigate grounds before raising in a writ application**
- **Contact defense attorney to discuss potential ineffective assistance ground**
- **Only raise claims that have good faith factual and legal basis**

OBLIGATION OF WRIT ATTORNEY

- **Ensure that defense attorney has full and fair opportunity to respond**
- **Do not use ineffective assistance allegation for personal attacks or settling scores**

OBLIGATIONS OF DEFENSE ATTORNEY

- **Respond to inquiries from writ attorney**
- **Provide complete and honest responses in affidavits and testimony**
- **Provide writ attorney with client file upon request**

OBLIGATIONS OF PROSECUTOR

- **Ensure the court has a complete record**
- **Ensure the defense attorney has a full and fair opportunity to respond to the allegation**
- **Ensure that justice is achieved in the resolution of the claim**
- **Do not use ineffective assistance claim to settle scores**

OBLIGATIONS OF TRIAL COURT

- **Assure the court has a full and complete record**
- **Assure the defense attorney has an adequate opportunity to respond to the allegation**
- **Analyze the allegation and evidence with an open mind**

GUILTY PLEAS

- **Must show that but for counsel's errors defendant would not have entered a guilty plea. *Hill v. Lockhart*, 474 U.S. 52 (1985)**

PLEA BARGAINING

***Strickland* test applies to plea bargaining stage of trial. Deficient advice concerning plea bargain constitutes ineffective assistance. Defendant must show that he would have accepted the offer, the state would not have withdrawn it and the trial court would have accepted it.**

***Lafler v. Cooper*, 566 U. S. 156 (2012)**

***Missouri v. Frye*, 566 U.S. 134 (2012)**

***Ex parte Argent*, 393 S.W.3d 781**

(Tex. Crim. App. 2013)

PLEA BARGAINING

Counsel ineffective for failure to properly advise defendant who was entering guilty plea whether state sentence would run concurrent with his federal sentence.

***Ex parte Moody*, 991 S.W.2d 856
(Tex. Crim. App. 1999)**

PLEA BARGAINING

Failure to advise defendant prior to defendant's entry of guilty plea that he had a viable legal defense that he did not perform an overt act needed to support his conviction constitutes ineffective assistance.

***State v. Diaz-Bonilla*, 495 S.W.3d 45
(Tex. App. – Houston [14th Dist.] 2016,
pet.ref'd)**

INCORRECT ADVICE ON PAROLE ELIGIBILITY

Counsel's misinformation to defendant as to his parole eligibility constituted deficient performance.

***Ex parte Moussazadeh*, 361 S.W.3d 684
(Tex. Crim. App. 2012)**

IMMIGRATION CONSEQUENCES

Failure to advise defendant of deportation consequences of conviction is ineffective assistance.

***Padilla v. Kentucky*, 559 U.S. 356 (2010)**

Prejudice shown from counsel's erroneous advice that guilty plea would not result in deportation when applicant shows he would not have pled guilty had he known he would be deported.

***Jae Lee v. United States*, 137 S.Ct. 1958 (2017)**

DUTY TO INVESTIGATE

STRATEGIC DECISIONS ARE BASED ON INVESTIGATION

The Supreme Court has made clear that “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.”

Strickland, 466 U.S. at 690-91

But when choices are made after less than complete investigation, they are reasonable only “to the extent that reasonable professional judgments support the limitations on investigation.” *Strickland*, 466 U.S. at 691.

And decisions made out of inattention are not strategic and afforded no deference at all.

Wiggins v. Smith, 539 U.S. 510, 526 (2003)

FAILURE TO INVESTIGATE

Failure of trial counsel to investigate information that someone else committed the crime is ineffective.

***Ex Parte Amezcuita*, 223 S.W.3d 363
(Tex. Crim. App. 2006)**

FAILURE TO INVESTIGATE

Attorney found ineffective for failing to investigate facts of robbery case, telling his client that a videotape existed of him committing the offense when no such tape existed, thereby causing defendant to plead guilty to robbery even though he had no memory of committing the offense because he suffered from alcoholic blackouts.

***Melton v. State*, 987 S.W.2d 72
(Tex. App. – Dallas 1998, no. pet.)**

IGNORANCE OF THE LAW

Counsel ineffective for lack of awareness of case holding that, on charge for possession of or attempt to possess controlled substance through use of fraudulent prescription form, State had to prove that defendant presented “fraudulent” form, not just that defendant committed “fraud” by interlineating upon otherwise legitimate form.

***Ex Parte Lewis*, 537 S.W.3d 917
(Tex. Crim. App. 2017)**

INEFFECTIVE ASSISTANCE DURING TRIAL

Attorneys rendered ineffective assistance by failing to investigate and present mitigating evidence of defendant being abused as a child in capital murder case.

***Ex parte Gonzales*, 204 S.W.3d 391
(Tex. Crim. App. 2006)**

Trial counsel's failure to impeach witness with his inconsistent statements, made when he told police that he saw shooter's face but could not make it out, constituted deficient performance.

***Ex parte Saenz*, 491 S.W.3d 819
(Tex. Crim. App. 2016)**

INEFFECTIVE ASSISTANCE DURING TRIAL

Failure to object to evidence of polygraph test administered to witness found to be ineffective.

***Ex parte Bryant*, 448 S.W.3d 29
(Tex. Crim. App. 2014)**

Counsel ineffective where he failed to participate in trial after motion for continuance was denied.

***Cannon v. State*, 252 S.W.3d 342
(Tex. Crim. App. 2008)**

INEFFECTIVE ASSISTANCE DURING TRIAL

Failure of counsel to determine that a prior conviction alleged to enhance misdemeanor DWI to felony did not belong to the defendant.

***Ex parte Harrington*, 310 S.W.3d 452
(Tex. Crim. App. 2010)**

Counsel ineffective for failing to request an interpreter for the defendant who was deaf.

***Ex parte Cockrell*, 424 S.W.3d 543
(Tex. Crim. App. 2014)**

INEFFECTIVE ASSISTANCE DURING TRIAL

- Failure to request limiting instruction.
Ex parte Varelas, 45 S.W.3d 627 (Tex. Crim. App. 2001)
- Failure to file application for probation.
Ex parte Welch, 981 S.W.2d 183 (Tex. Crim. App. 1998)
- Failure to request accomplice witness instruction when case based entirely on accomplice testimony. *Ex parte Zepeda*, 819 S.W.2d 874 (Tex. Crim. App. 1991)

INEFFECTIVE ASSISTANCE DURING TRIAL

A defendant has the right under Sixth Amendment to insist that counsel refrain from admitting guilt during the guilt-phase of a capital murder trial, even when counsel's view is that confessing guilt offers the defendant the best chance to avoid the death penalty.

***McCoy v. Louisiana,*
138 S.Ct. 1500 (2018)**

INEFFECTIVE ASSISTANCE DURING TRIAL

Counsel ineffective by failing to object to instruction that defendant was guilty of injury to child if he intentionally and knowingly engaged in conduct causing injury; law was clearly established that injury to child required proof that defendant intended result of offense.

***Banks v. State,*
819 S.W.2d 676**

(Tex. App. – San Antonio 1991, *pet. ref'd*)

**WE DON'T NEED NO
STINKING EXPERTS**



FAILURE TO OBTAIN EXPERT ASSISTANCE

- **Retained counsel performed deficiently in limiting, for economic reasons, his investigation of medical evidence before advising client to plead guilty. *Ex parte Briggs*, 187 S.W.3d 458 (Tex. Crim. App. 2005)**

FAILURE TO OBTAIN EXPERT ASSISTANCE

Failure to hire DNA expert in sexual assault and kidnapping prosecution amounted to deficient performance, although counsel consulted other attorneys, doing so was insufficient investigation in this case given the fact that counsel still lacked much understanding of DNA science, and expert testimony likely would have given a boost to the defense beyond what could have been accomplished through cross-examination. (no prejudice found)

***Ex parte Napper*, 322 S.W.3d 202
(Tex. Crim. App. 2010)**

FAILURE TO OBTAIN EXPERT ASSISTANCE

Defense counsel ineffective for failure to request additional funds to replace an inadequate expert in firearms and toolmark analysis.

***Hinton v. Alabama,*
571 U.S. 263 (2014)**

FAILURE TO OBTAIN EXPERT ASSISTANCE

Ineffective assistance based on counsel's failure to consult with an expert concerning sexual abuse and proper methods of interviewing children

***Wright v. State,*
223 S.W.3d 36 (Tex. App. – Houston [14th
Dist.] 2016, pet. ref'd)**

FAILURE TO CALL EXPERT

TEXANS HATE THE IVY LEAGUE

- **Capital murder case**
- **Issue of causation over death of fetuses**
- **Defense expert available to contradict prosecution theory**
- **Calling the doctor could have presented potential pitfalls for the defense. For instance, the Angelina County jurors might not have been especially receptive to an expert traveling halfway across the country- from Yale-to testify in their small-town, East-Texas courthouse.**
- **No ineffective assistance**

***Ex parte Flores*, 387 S.W.3d 626, 637
(Tex. Crim. App. 2012)**

PUNISHMENT PHASE INEFFECTIVENESS

- **The sentencing process consists of weighing mitigating and aggravating factors, and making adjustments in the severity of the sentence consistent with this calculus.**
- **Failure to contact or call to testify twenty character witnesses is ineffective assistance.**

***Milburn v. State*, 15 S.W.3d 267**

(Tex. App. – Houston [14th Dist.] 2000, *pet. ref'd.*)

PUNISHMENT PHASE INEFFECTIVENESS

Counsel ineffective for calling expert witness at sentencing phase of capital murder trial who testified that being black created an increased probability of future dangerousness.

***Buck v. Davis*, 137 S.Ct. 759 (2017)**

PUNISHMENT PHASE INEFFECTIVENESS

Failure to object during punishment phase to testimony by DEA agent on dangers and societal costs of methamphetamine and prosecutor's closing argument about "people" bringing in the drug to "poison" the county's children constituted deficient performance.

***Ex parte Lane*, 303 S.W.3d 702
(Tex. Crim. App. 2009)**

PUNISHMENT PHASE INEFFECTIVENESS

Failure of counsel to discover evidence showing that the defendant was not at the scene of a crime used as an extraneous offense at punishment phase constitutes ineffective assistance of counsel.

***Ex parte Rogers*, 369 S.W.3d 858
(Tex. Crim. App. 2012)**

PUNISHMENT PHASE INEFFECTIVENESS

Trial counsel's failure to investigate and discover defendant's mental health history prejudiced defendant at penalty phase of trial; there was reasonable probability of less severe sentence; substantial mitigating evidence was available.

***Lampkin v. State*, 470 S.W.3d 876
(Tex. App. – Texarkana 2015, *pet. ref'd*)**

MITIGATING EVIDENCE

“We conclude that Applicant is entitled to a new punishment hearing because his trial counsel’s mitigation investigation fell below an objective standard of reasonableness, and had counsel not been deficient, there is a reasonable probability that at least one juror would have struck a different balance and would have answered the mitigation issue differently, voting to spare Applicant’s life.”

***Ex Parte Garza,*
620 S.W.3d 801
(Tex. Crim. App. 2021)**

INEFFECTIVENESS ON MOTION FOR NEW TRIAL

Rights to effective assistance applies at Motion for New Trial.

***Cooks v. State*, 240 S.W.3d 906
(Tex. Crim. App. 2007)**

To prove harm, must present a “facially plausible” claim that could have been argued in Motion for New Trial but was not.

***Cooks*, 240 S.W.3d at 912**

INEFFECTIVENESS ON APPEAL

To obtain relief in the form of a new direct appeal on a claim of ineffective assistance of appellate counsel, a habeas applicant must show that (1) counsel's decision not to raise a particular point of error was objectively unreasonable, and (2) there is a reasonable probability that, but for counsel's failure to raise that particular issue, he would have prevailed on appeal.

***Ex parte Flores*, 387 S.W.3d 626
(Tex. Crim. App. 2012)**

INEFFECTIVENESS ON APPEAL

An attorney need not advance every argument, regardless of merit, urged by appellant, but if appellate counsel fails to raise a claim that has indisputable merit under well-settled law and would necessarily result in reversible error, appellate counsel is ineffective for failing to raise it.

***Ex parte Flores*, 387 S.W.3d 626
(Tex. Crim. App. 2012)**

EGREGIOUS CONDUCT BY COUNSEL

Counsel had actual conflict of interest. Trial counsel was engaged in a coercive sexual relationship with Applicant; trial counsel had access to and control over Applicant's case; trial counsel had a political, financial, and personal interest which colored his representation of Applicant. The Court finds that this actual conflict of interest violated Applicant's Sixth Amendment rights.

***Ex Parte Sanchez*, No. WR-84,238-01,
2017 WL 3380147
(Tex. Crim. App. 2017)**